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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. LUIS BRIZUELA-NAVAS, Defendant and Appellant.	A153810 (Contra Costa County Super. Ct. No. 05-151284-7)

Luis Brizuela[1] appeals from a February 2018 order amending his abstract of judgment and declining his request to update his custody credits. We conclude the order is not appealable and dismiss this appeal.

BACKGROUND

A.

We recently decided an earlier appeal in this case. (*People v. Brizuela-Navas* (Oct. 17, 2018, A151402) (*Brizuela-Navas*) [nonpub. opn.].) As relevant here, in August 2015, Brizuela (then 16 years old) was charged by information in adult court with sexual crimes allegedly committed between the ages of 12 and 15. In April 2016, he pled guilty to two counts of forcible lewd conduct (Pen. Code, § 288, subd. (b)(1)),[2] other charges were dismissed, and the anticipated sentence was eight years to be served at the

[1] Appellant was charged as Luis Miguel Brizuela-Navas, but he goes by Brizuela. We use his preferred last name. Brizuela asks that we use his last initial only "[b]ecause of the nature of the charges and his age at the time of them." In a prior appeal, we rejected a similar request and abide by that ruling here.

[2] Undesignated statutory references are to the Penal Code.

Division of Juvenile Justice (the Division). When the Division said it could not house Brizuela with an eight-year sentence, the prosecutor agreed to a reduction to five years. In June 2016, the court imposed a five-year sentence, found an amenability report under Welfare and Institutions Code section 707.2 was not required, and remanded Brizuela to the custody of the Division. Brizuela did not appeal.

In October 2016, at the Division's request, the court ordered an amenability report. In May 2017, Brizuela was found amenable to the Division's training and treatment programs, and the court ordered him housed at the Division. The court rejected Brizuela's argument that he was entitled to a transfer hearing pursuant to Proposition 57, which the voters adopted in November 2016. Proposition 57 requires that the court, rather than the district attorney, decide whether a juvenile may be prosecuted in adult court. Brizuela appealed this ruling. (*Brizuela-Navas, supra,* A151402.)

In October 2018, we issued our opinion in *Brizuela-Navas, supra,* A151402, rejecting Brizuela's argument that he was entitled to a transfer hearing under Proposition 57. We held that Brizuela was sentenced in June 2016; the sentence became final 60 days thereafter when the time to appeal expired, and the subsequent order for an amenability report under Welfare and Institutions Code, section 707.2, did not affect the finality of the sentence. Because Brizuela's sentence had become final before the adoption of Proposition 57, the proposition did not apply retroactively to his case. (*Brizuela-Navas, supra*, A151402.)

We grant Brizuela's request to incorporate by reference the record in *Brizuela-Navas, supra*, A151402 into the record in this appeal. (See Cal. Rules of Court, rule 8.147(b)(1).)

B.

This appeal focuses on a different aspect of Brizuela's sentence—the proper calculation of presentence custody credits. In its abstract of judgment, filed June 29, 2016, the court awarded Brizuela 614 presentence custody credits, consisting of 534 credits for actual days spent in presentence custody (actual credits) plus 80 credits based on his work participation and good behavior (conduct credits). The court limited

his conduct credits to 15 percent of his actual credits pursuant to section 2933.1, subdivision (c), which applies a 15 percent cap on conduct credits for persons convicted of certain crimes, including forcible lewd conduct. (See §§ 2933.1, subds. (a), (c); 667.5, subd. (c)(6).) Brizuela represents that his entire confinement between his arrest and his delivery to the Division after February 2018 was in a juvenile detention facility. The People do not dispute this assertion.

In January 2018, the probation department informed the court that Brizuela was still in juvenile hall due to a defect in the May 2017 sentencing order and abstract of judgment. At a February 2018 hearing, the court indicated it would amend the abstract to order Brizuela housed at the Division pursuant to Welfare and Institutions Code section 1731.5, subdivision (c), thus permitting his transfer to the Division. Brizuela asked the court also to amend the abstract to reflect additional credits Brizuela had earned during his confinement in juvenile hall following the sentencing hearing in June 2016. The court refused, explaining the Division would calculate those credits once Brizuela was transferred. The court issued an amended abstract indicating "the sentence is per W&I 1731.5(c)" and "Juvenile Hall to transport deft to [the Division] to serve sentence imposed 6/29/16." The court left unchanged the 614 presentence actual and conduct credits awarded earlier. Brizuela filed this appeal.

C.

While this appeal has been pending, in March 2018, Brizuela filed a petition for a writ of habeas corpus in the trial court seeking additional actual credits for his confinement in juvenile hall after June 29, 2016, and additional conduct credits for his entire confinement in juvenile hall.[3] He argued that the 15 percent cap on presentence conduct credits applies only to confinement in "jail, industrial farm, or road camp," not

[3] We grant Brizuela's request that we take judicial notice of filed documents in his habeas proceedings. (Evid. Code, §§ 452, subd. (d)(1), 459, subd. (a).) We deny his request that we take judicial notice of facts set forth in a declaration by his attorney regarding his actual dates of confinement and the Division's calculation of his credits once he was transferred. These facts are not proper subjects of judicial notice. (See *id.*, § 452, subds. (g), (h).)

juvenile detention. He also contended he was entitled to an additional 635 actual credits for a total of 1,169 actual credits, plus either 1,168 or 1,169 conduct credits. Because his grand total of credits (2,337 or 2,338 days) exceeded his sentence, he argued he was entitled to immediate release. The trial court stayed the habeas proceedings pending resolution of *Brizuela-Navas, supra,* A151402.[4] In July, the trial court denied Brizuela's motion for reconsideration.

DISCUSSION

Appealing from the February 2018 order, Brizuela makes two arguments: (1) the court failed to calculate the credits he is owed for the time he spent in custody following his June 2016 sentencing, and (2) the court erred by applying the 15 percent cap on conduct credits under section 2933.1, subdivision (c). Neither issue is properly before us on appeal, and we decline to treat the appeal as a petition for writ of habeas corpus.

A.

Postsentencing Credits

Brizuela contends the court erred by refusing to calculate the credits he is owed for the time he spent in custody between June 2016, when he was sentenced, and February 2018, when the court corrected an error in the abstract of judgment but left the credits unchanged. We disagree, and we also conclude the latter order is not appealable.

Brizuela appears to concede that the trial court is required to calculate the credits only during the period "prior to sentencing" (§ 2900.5, subd. (d)); thereafter, the agency with custody of the person is responsible for calculating credits (§ 2900.5, subd. (e)). So the question is whether the sentencing occurred in June 2016 or February 2018. As noted, we already determined in the prior appeal that sentencing occurred in June 2016. (*Brizuela-Navas, supra,* A151402.) The February 2018 order merely clarified the abstract of judgment to accurately reflect Brizuela's placement at the Division. It did not

[4] Although both Brizuela and the People represent that the trial court denied Brizuela's habeas petition, the court's April and July 2018 orders plainly state the habeas proceedings were stayed pending resolution of *Brizuela-Navas, supra,* A151402. While that appeal has since been resolved, nothing in the record indicates the habeas petition has been resolved.

sentence him anew. Accordingly, the court lacked authority to update the credits in February 2018 and properly declined Brizuela's request to do so. (§2900.5, subd. (e).)

Moreover, the February 2018 order from which Brizuela appeals is not appealable. A criminal defendant may appeal only from a final judgment of conviction or from postjudgment orders that affect the party's substantial rights. (§ 1237; *People v. Gallardo* (2000) 77 Cal.App.4th 971, 980.) Because the court had no authority to grant Brizuela's request, the order did not affect his substantive rights and is not appealable. (See *People v. Dynes* (2018) 20 Cal.App.5th 523, 528 [denial of motion asking trial court to make order outside its jurisdiction is not an appealable postjudgment order affecting the defendant's substantial rights].)

B.

Fifteen Percent Cap on Conduct Credits

Similarly, the February 2018 order is not appealable for purposes of Brizuela's second argument—i.e., that the trial court erred when it applied a 15 percent cap on his presentence conduct credits, under section 2933.1, subdivision (c). The trial court imposed the cap in the June 2016 order, which we have deemed to be the final sentencing order, and, as noted, Brizuela's appeal from that order is now final. Additionally, Brizuela did not raise the issue at the February 2018 hearing.

C.

Availability of Habeas Corpus

Although we have not been asked to do so, we have considered treating this appeal as a petition for writ of habeas corpus. (See *People v. Segura* (2008) 44 Cal.4th 921, 928, fn. 4 [construing an invalid appeal as a habeas petition].) Because a court exceeds its jurisdiction when it imposes an unauthorized sentence, Brizuela may raise the issue in a habeas petition even after the judgment has been affirmed on direct appeal. (*In re Birdwell* (1996) 50 Cal.App.4th 926, 930.) We are quite cognizant of the potential urgency of the situation: if Brizuela's arguments are correct, he may be eligible for immediate release.

We decline to do so for three reasons. First, although we do not decide the issue today, Brizuela's argument appears to lack merit. Conduct credits are governed by section 4019, which does not expressly allow conduct credits for a minor's time in juvenile detention facilities. (See *In re Ricky H.* (1981) 30 Cal.3d 176, 186 [observing § 4019 "refers only to prisoners in a county jail and does not by its terms apply to juveniles detained in juvenile hall"].) When a minor is held in juvenile custody in connection with an adult prison sentence, however, the equal protection clause requires that the minor receive conduct credits. (*People v. Twine* (1982) 135 Cal.App.3d 59, 63.) The rationale is key: juveniles that are detained in presentence custody should be treated the same as adults similarly situated. (*Ibid.*; *People v. Duran* (1983) 147 Cal.App.3d 1186, 1189–1190, 1192–1193 [determining that equal protection applies to juveniles and adults who are confined for diagnostic purposes regardless of whether the confinement is in a juvenile or adult facility].) Here, an adult prisoner convicted of the same crime as Brizuela would be subject to the 15 percent cap on conduct credits. (§§ 2933.1, subds. (a), (c), 667.5, subd. (c).) Brizuela argues that the cap does not apply to him because § 2933.1 expressly applies only to persons confined in adult facilities, not juvenile facilities. (§ 2933.1, subd. (c) [applying 15 percent cap to persons confined in a jail, industrial farm, or road camp].) But, as the Attorney General notes, Brizuela is only entitled to conduct credits because the equal protection clause requires him to be treated the same as similarly situated adults. Brizuela is seeking *more* credits than a similarly situated adult could obtain, which is hard to square with the equal protection clause.

Second, Brizuela already has a habeas petition pending in the trial court.

Third, we do not have an adequate record regarding Brizuela's postsentencing custody or the Division's calculation of his postsentencing credits. If Brizuela chooses to pursue his habeas petition in Superior Court, he can develop a proper record. (See *In re Pope* (2010) 50 Cal.4th 777, 780–781 [deciding habeas petition challenging prison's calculation of conduct credits].)

DISPOSITION

The appeal is dismissed.

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BURNS, J.

WE CONCUR:

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JONES, P. J.

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NEEDHAM, J.